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ROSENMAN & COLIN

1300 19TH STREET, N.W., WASHINGTON, D.C. 20036

TELEPHONE (202) 463-7177

TELECOPIER (202) 429-0046

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

NEW YORK OFFICE  
575 MADISON AVENUE  
NEW YORK, NY 10022-2585  
TELEPHONE (212) 940-8800

SAMUEL I. ROSENMAN (1896-1973)  
RALPH F. COLIN (1900-1985)

SPECIAL COUNSEL  
JEROLD L. JACOBS

June 2, 1992

Donna R. Searcy, Secretary  
Federal Communications Commission  
Washington, D.C. 20554

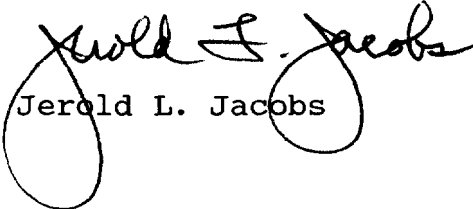
Re: GC Docket No. 92-52  
Reexamination of Policy Statement on  
Comparative Broadcast Hearings

Dear Ms. Searcy:

On behalf of our client, Sunrise Broadcasting Corp., transmitted herewith for filing are an original and nine (9) copies of its "COMMENTS OF SUNRISE BROADCASTING CORP." in the above-referenced rulemaking proceeding.

Please direct all inquiries and communications concerning this matter to the undersigned.

Very truly yours,

  
Jerold L. Jacobs

Enc.

cc: As on Certificate of Service (all w/enc.)

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Reexamination of the Policy ) GC Docket No. 92-52  
Statement on Comparative )  
Broadcast Hearings )

TO: The Commission

COMMENTS OF SUNRISE BROADCASTING CORP.

SUNRISE BROADCASTING CORP. ("Sunrise"), by its attorneys, pursuant to §1.415 of the Commission's Rules, hereby comments on the "finder's preference" proposal in the Notice of Proposed Rulemaking, FCC 92-98, released April 10, 1992 ("NPRM"), in the above-captioned proceeding. In support whereof, the following is shown:

I. BACKGROUND

1. Sunrise is one of three applicants for a new FM broadcast station at St. Marys, Kansas (File No. BPH-910912MC). The "filing window" to which the applicants responded resulted from an FM allotment rulemaking proceeding (MM Docket No. 90-585), in which:

(a) Sunrise filed the initial Petition for Rulemaking (RM-7338) on March 8, 1990, which proposed the allotment of Channel 275C2 as St. Marys' first local broadcast station;

(b) The Commission released a Notice of Proposed Rulemaking, 5 FCC Rcd 7108 (MMB 1990), which preliminarily recommended adoption of Sunrise's allotment proposal; and

(c) By Report and Order, 6 FCC Rcd 3751 (MMB 1991), the Commission allotted Channel 275C2 at St. Marys.

Although the St. Marys applications have not yet been designated for comparative hearing, it is anticipated that hearing designation will occur prior to the effective date of Commission action on the "finder's preference" proposal herein.

## II. INTRODUCTION

2. Sunrise shares the Commission's view (NPRM, ¶5) that a comprehensive review of the comparative broadcast hearing criteria adopted more than 25 years ago in the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) ("Policy Statement"), is long overdue. However, Sunrise's Comments address only the following points (NPRM, ¶¶ 10, 29, 32, 41, and 42(d)):

Adding a "finder's preference" as a distinct comparative factor in the analysis of competing new FM and TV broadcast applications;

The weight to be accorded this preference in the comparative process; and

The effective date for applying this preference to broadcast applications.

## III. A "FINDER'S PREFERENCE" IS FULLY JUSTIFIED AS A DISTINCT AND SIGNIFICANT COMPARATIVE FACTOR

3. The NPRM (at ¶10) seeks comments on whether to institute a "finder's preference" for "applicants successfully petitioning for a new allotment of a frequency". Sunrise

fully supports the addition of a "finder's preference". As Sunrise will demonstrate herein, such a new comparative criterion is consistent both with past Commission precedent and with current and emerging Commission policy favoring the identification of comparative criteria which "provide a realistic basis for predicting whether one applicant will better serve community needs than other applicants" (NPRM, ¶13).

4. It is well established that "in the comparative process, the Commission must make subtle judgments where necessary and evaluate all distinctions between the parties that are not frivolous or wholly unsubstantial". James and Sharon Deon Sepulveda, 3 FCC Rcd 9 (Rev. Bd. 1988) (emphasis added), citing Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949), and Alexander S. Klein, Jr., 86 FCC 2d 423, 430 (1981). In that spirit, the Policy Statement, supra at 399, recognized that a comparison of competing applicants could include consideration of "any relevant and substantial factor," so long as it was based on "significant evidence".

5. In recent years, the Commission has augmented the Policy Statement's original list of comparative factors with preferences for minority and female status and, most relevant to the "finder's preference" idea, for owning a daytime-only AM station in the same community as a new FM station. In the latter situation, the Commission held in FM Broadcast Assignments, 101 FCC 2d 638, 645 (1985):

We believe that affording comparative credit to daytime-only licensees who apply for new FM channels

in their community of license also increases the likelihood of securing the best practicable service....[A]warding special comparative consideration to daytimers serves as an incentive to licensees in general that operation of facilities in the public interest, notwithstanding the difficulties encountered, can lead to certain added benefits.

Applying the above "added benefits" rationale to an applicant who files a rulemaking petition which results in a new FM or TV frequency allotment in a community, Sunrise maintains that the time, effort, resources, and zeal which go into such a petition should also be properly rewarded.

6. Simply put, Sunrise urges that, like an AM daytimer, the successful FM or TV channel rulemaking petitioner has exhibited a special kind of dedication and interest in securing the "best practicable service" for its proposed community of license and a special kind of determination to overcome substantial engineering and procedural "difficulties" facing it. Hence, consistent with the Johnston Broadcasting Co. case and its Commission progeny, such a petitioner warrants a significant comparative preference over its less adventurous competitors for the allotted frequency. Sunrise believes that in this way, the "finder's preference" can provide an important incentive and appropriate comparative recognition for the petitioner, both of which are consistent with the paramount public interest.

7. The "pioneer's preference" adopted by the Commission in Pioneer's Preference, 6 FCC Rcd 3488 (1991), recon. granted

in part, 7 FCC Rcd 1808 (1992), also provides an important policy precedent for adopting a significant comparative preference for a broadcast frequency "finder". Indeed, in Pioneer's Preference, supra at 3492, the Commission adopted a dispositive comparative preference rule:

to guarantee the innovating party a license... (assuming it is otherwise qualified)...to reduce the risk and uncertainty innovating parties face in our existing rulemaking and licensing procedures, and therefore to encourage the development of new services and new technologies.

Sunrise submits that an FM or TV channel rulemaking petitioner needs the same kind of reduction of risk and uncertainty, lest many deserving communities which currently lack channel allotments may never receive them. In those places, especially where a first local transmission service is at issue (as in St. Marys, Kansas), Sunrise urges that a successful allotment proceeding brings a "new [broadcast] service" to the community, which is as important to that locale as a "new [technological] service".

#### IV. VERY SUBSTANTIAL COMPARATIVE CREDIT SHOULD BE AWARDED FOR THE "FINDER'S PREFERENCE"

8. Given the value of the "finder's" efforts as valid predictors of greater concern for serving the community's needs and "best practicable service" (see Paragraph 3 and 5, supra), Sunrise urges that the "finder's preference" should be weighed very heavily in the comparative analysis -- i.e., it should have the same weight as the next most important

comparative factor, perhaps the "mass media diversification" criterion. Indeed, Sunrise believes that the Commission's analysis of Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), in Pioneer's Preference, supra at 3490-92, might even justify a dispositive preference in comparative broadcast cases. However, the Commission appears unlikely to take such a drastic policy leap in this proceeding.

9. In any event, Sunrise strongly urges that the credit for the "finder's preference" should be set considerably higher than the "AM preference" discussed in Paragraph 5, supra. In practice, the "AM preference" has proven to be almost meaningless, because, from the outset (FM Broadcast Assignments, supra at 645-46), it was designated as merely an "upgrade" of another comparative enhancement factor -- previous broadcast experience -- which itself has always been treated as the least significant comparative criterion. See Policy Statement, supra at 396 (previous broadcast experience is "of minor significance").

10. Similarly, Sunrise urges that the "finder's preference" deserves greater weight than the minority and female comparative criteria. In this proceeding, each comparative criterion must be evaluated in terms of its unique contribution toward selecting the most worthy permittee of a new broadcast station. In that computation, the efforts of the "finders" are entitled to major recognition per se, regardless of whether they are minority or female applicants. In turn,

minority and female applicants will continue to receive comparative credit for those attributes, regardless of whether they are "finders". Thus, Sunrise does not believe that the "finder's preference" is antithetical to the minority or female preference; each factor deserves due credit in its own right. However, Sunrise maintains that, for the "finder's preference" to be a meaningful incentive for rulemaking petitioners, it must receive greater weight than just about any other comparative criterion, except perhaps media diversification. See Paragraph 8, supra.

**V. THE "FINDER'S PREFERENCE" SHOULD BE APPLIED  
RETROACTIVELY TO MAY 13, 1991**

11. In Paragraph 73 of Pioneer's Preference, supra at 3497, the Commission specifically declined to apply the pioneer's preference to broadcast allotments and the comparative broadcast hearing process, because "this proceeding deals only with the development of new communications services and technologies". That text was released on May 13, 1991. Since that time (and earlier), broadcasters and certain Commissioners have repeatedly expressed interest in the possibility of a broadcast-related "finder's preference".

12. Although the subject NPRM was adopted 10 months later, Sunrise maintains that the communications industry and the general public were on general notice about this matter since May 1991. Thus, the "finder's preference" situation is very unlike FM Broadcast Assignments, supra. There, the




daytimer AM preference was applied only to "new FM applications filed, but not yet designated for hearing, as of the effective date" of the text, because "applicants participating in a hearing, or post-hearing process...have expended significant time and funds in reliance on the existing comparative standards" (emphasis added). *Id.* at 646 and n. 13. Here, applicants who filed after May 13, 1991 have been on notice about this issue for more than a year and should not be heard to cry "surprise" about having the "finder's preference" applied retroactively if their applications are designated for hearing before the effective date of final action in this proceeding.

## VI. CONCLUSION

13. The "finder's preference" combines incentive and reward for discovering and prosecuting new FM and TV channel allotments. Since bringing new local transmission services to communities clearly has high public interest importance, the reward should also be high. Hence, Sunrise urges the Commission to adopt a "finder's preference" with very significant comparative weight and to apply that preference

to any proceeding where the competing applications were filed  
after May 13, 1991.

Respectfully submitted,  
SUNRISE BROADCASTING CORP.

By   
Howard J. Braun  
Jerold L. Jacobs

ROSENMAN & COLIN  
1300 - 19th Street, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 463-7177

Its Attorneys

Dated: June 2, 1992

**CERTIFICATE OF SERVICE**

I, Katherine D. Wright, a secretary in the law offices of Rosenman & Colin, do hereby certify that on this 2nd day of June, 1992, I have caused to be hand-delivered a copy of the foregoing "**COMMENTS OF SUNRISE BROADCASTING CORP.**" to the following:

Roy J. Stewart, Chief\*  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W. Room 314  
Washington, D.C. 20554

William H. Johnson, Deputy Chief\*  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W. Room 314  
Washington, D.C. 20554

Charles Dziedzic, Chief\*  
Hearing Branch  
Enforcement Division  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W. Room 7212  
Washington, D.C. 20554

Robert L. Pettit, General Counsel\*  
Office of General Counsel  
Federal Communications Commission  
1919 M Street, N.W. Room 614  
Washington, D.C. 20554

Renee Licht, Dep. General Counsel\*  
Office of General Counsel  
Federal Communications Commission  
1919 M Street, N.W. Room 614  
Washington, D.C. 20554

David S. Senzel, Esq.\*  
Office of General Counsel  
Federal Communications Commission  
1919 M Street, N.W. Room 610  
Washington, D.C. 20554

  
**Katherine D. Wright**